BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DUARD BRIAN JAY Claimant	)	
VS.	)	Docket No. 1,016,400
CESSNA AIRCRAFT CO. Self-insured Respondent	)	

ORDER

Claimant requested review of the September 12, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on November 29, 2005.

APPEARANCES

Gary A. Winfrey, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Furthermore, in addition to the Stipulation filed August 12, 2005, the parties agreed during oral argument to the Board that claimant is not seeking temporary total disability compensation and respondent is not seeking reimbursement of the short-term disability benefits paid to claimant. The parties also stipulated that timely notice of accident is not an issue and that respondent did not file an employer's report of accident with the Division of Workers Compensation.

ISSUES

The Administrative Law Judge (ALJ) found that claimant turned his ankle wrong while in the course of his employment but that the injury did not arise out of the nature, conditions, obligations and incidents of employment. Accordingly, the ALJ denied benefits to claimant.

The claimant requests review of compensability and all related issues. Specifically, claimant maintains that he met his burden of proof that his ankle injury arose out of and in the course of his employment. Claimant further requests that he be awarded a

permanent partial impairment of his left lower extremity in the amount of 16 percent, based on the testimony of Dr. Pedro Murati, or in the amount of 13 percent, based on the testimony of Dr. John Fanning.

Respondent argues that claimant failed to prove an accident arising out of his employment. Respondent further asserts that claimant's fall was due to a risk that was personal to claimant and, therefore, the injury did not arise out of his employment with respondent. In the alternative, if the Board finds the claimant suffered an injury arising out of and in the course of his employment, respondent requests the Board find that claimant failed to provide a timely written claim for compensation. If the Board finds that claimant suffered a compensable injury and provided a timely claim for compensation, respondent requests that the Board find that claimant suffered no permanent partial impairment based on the testimony of Dr. Chris Fevurly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began work for Cessna in August 1999 as an experimental mechanic. His last day of work at Cessna was September 17, 2003, the day he injured his ankle. He never returned to work and was terminated by Cessna on March 7, 2005, because he had been on medical leave for 18 months.

Claimant testified that he injured his left ankle on September 17, 2003, while in the respondent's break room during his break. He testified the break room is located in the building in which he worked and is provided for workers to take a ten-minute break to sit down and relax. Claimant stated that he and the other workers are on call while on break and that workers are paid for break time taken.

Claimant testified that on the date of his injury, he walked into the respondent's break room, flipped on the light, turned and ran into a table. He bounced off the table and mis-stepped, landing on the floor. Claimant stated that when he struck the table, his full weight was on his left foot. He remained on the floor for three to five minutes before he got up and told his supervisor, Barry Allen, about the fall. He said he did not tell Mr. Allen how he sprained his ankle, and Mr. Allen did not ask but just sent him to the clinic. Mr. Allen recorded on claimant's attendance sheet for September 17, 2003, that claimant told

him he had injured himself while "getting up from the chair he was setting in, in the break room."[1]

Claimant testified that he told the clinic personnel that he was injured when he ran into a table and fell, twisting his ankle. He was aware that clinic personnel are claiming he did not tell them he hit the table. The clinic's records show that claimant stated "he was walking into break room when he stepped wrong [and] fell to floor."[2] Claimant saw his family physician, Dr. Chapman on September 18, 2003. On the injury form he filled out for Dr. Chapman, claimant wrote that he "slipped and fell and twisted ankle, left foot."[3] Claimant admitted that his original and amended application for hearing stated that the accident happened when he "tripped on a table leg."[4] Claimant also admitted that in his regular hearing testimony, he did not state that he slipped.

Claimant stated that on the date of his accident, he did not tell the clinic personnel that he was going to file a claim for workers compensation, but also stated that no one at the clinic told him his injury was not going to be accepted as work related. He claims he was only told this after he filed his workers compensation claim. Christina Nelson, a registered nurse employed by respondent in their clinic, saw claimant on September 17, 2003, when he came in complaining of pain in his left ankle. Claimant told her that he had stepped wrong and fell to the floor and that there was nothing on the floor to cause his fall, no water or hole. Ms. Nelson consulted with the company doctor, who told her the injury was considered personal since nothing at work caused the injury. On March 5, 2004, claimant telephoned the clinic and asked Ms. Nelson the name of respondent's insurance company, telling her that he may have to get an attorney to assist him in filing a workers compensation claim. Ms. Nelson asked him how the injury occurred, and claimant advised her that he walked into the break room, turned on the light and walked into a table. He said he hit his left thigh on the table, which caused him to fall to the floor, twisting his ankle. Ms. Nelson stated that at this point, claimant's story made the injury work-related, so she requested that he bring in his records and meet with the company doctor.

Respondent argues that claimant's written claim for damages was filed 201 days after the date of the claimed accident and, therefore, was not timely pursuant to K.S.A. 44-520a. Claimant filed his workers compensation claim on April 5, 2004. In the interim, claimant sought out his own medical attention for his injury. His bills were paid by his

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[1]Allen Depo., Ex. 1.

[2]Nelson Depo., Ex. 1.

[3]R.H. Trans.,Resp. Ex. 1.

[4]Form K-WC E-1 (filed Apr. 16, 2004); Form K-WC E-1 (filed Mar. 15, 2005).

personal health insurance, minus some co-payments and deductibles. Claimant applied for and received short-term disability payments from MetLife, who administers short-term and long-term disability plans for respondent. Short-term disability benefits are for nonoccupational injuries. Claimant was approved for disability benefits starting September 18, 2003, and was paid $390.40 per week for 13 weeks for a total of $5,075.20.

On October 3, 2003, approximately two weeks after his alleged work injury, claimant was in a cam walker and was walking with crutches when he hit an icy patch and the crutches slipped out from underneath him and he fell. On or about May 15, 2004, claimant again hurt his ankle in an incident at home. At the time he was in an air cast and was carrying groceries when he stepped on the edge of the sidewalk, twisting his ankle. Claimant attributed both falls to his weak ankle from the injury in the break room at respondent but contends his ankle was not made worse by either incident. Claimant had a stroke in March 2004, which was unrelated to his ankle injury.

Dr. Chapman had placed claimant on work restrictions the day after the accident, and later referred claimant to Dr. John Fanning, a board certified orthopedic surgeon specializing in problems of the foot and ankle. Dr. Fanning first saw claimant on November 7, 2003, and at that time claimant reported to him that he had hit a table at work and fell, twisting his ankle. Claimant also indicated that he was off work on family medical leave. Dr. Fanning examined claimant and ordered a CT scan of claimant's ankle and foot. The CT scan showed claimant had either a contusion of the bone or a partial fracture or microfracture, but not a complete typical fracture.

Dr. Fanning next saw claimant on November 13, 2003, at which time he released claimant for sit-down work only. Dr. Fanning saw claimant again on December 2, 2003, at which time claimant told him he was not ready to return to regular duty work. Because of claimant's subjective complaints of pain, Dr. Fanning continued work restrictions. However, he believed claimant was improving and stated he could work up two to three hours per eight-hour shift, non-continuous, with sitting breaks as needed. Dr. Fanning continued that restriction after claimant's December 23, 2003, office visit. On January 15, 2004, claimant advised him that he was ready to try returning to work, and Dr. Fanning released him with no restrictions starting Monday, January 19, 2004. However, the next day, January 16, 2004, Dr. Fanning added restrictions of no climbing ladders and said claimant "may be up 4-5 Hrs/day."[5] There is no reason for this change in Dr. Fannings' records, and in his deposition, Dr. Fanning could not explain why this change was made.

At his February 19, 2004, office visit, claimant again told Dr. Fanning he did not feel he could do his regular job, and Dr. Fanning gave him restrictions of no kneeling, no

[5] Fanning Depo., Ex. 1 at 20.

squatting and no ladders. Dr. Fanning next saw claimant on May 20, 2004, which was after claimant's stroke and after claimant had tripped on the sidewalk carrying groceries. Dr. Fanning said the May 2004 fall could have exacerbated claimant's previous injury. Dr. Fanning saw claimant on June 22, 2004, at which time claimant again was released for full work activity. Respondent, however, did not allow claimant to return to work because he had not been released by the doctor treating him for his stroke. Claimant called Dr. Fanning again and requested a follow-up in August 2004. At that time, Dr. Fanning noted he believed claimant was at maximum medical improvement. Dr. Fanning last saw claimant on June 14, 2005. Dr. Fanning rated claimant as having a 13 percent permanent partial impairment of the foot and ankle, which correlated to a 9 percent impairment of the lower extremity and 4 percent to the body as a whole based on the AMA *Guides*[6]. Dr. Fanning apportioned all of the impairment to claimant's injury in September 2003, with no apportionment going to the May 2004 incident.

Dr. Fanning admitted that, other than the one-day period from January 15, 2004 to January 16, 2004, he had claimant on work restrictions until June 22, 2004.

Dr. Pedro Murati saw claimant at the request of claimant's attorney on January 18, 2005. Claimant was complaining of left ankle pain and swelling. Claimant reported to Dr. Murati that on September 17, 2003, he ran into a table, lost his balance, twisted and fell to the floor. Claimant also told him he had reinjured his ankle in May 2004 while carrying some groceries. Dr. Murati testified that claimant sustained a fracture of his talus as a result of the injury received at work on September 17, 2003. Dr. Murati believed claimant was at maximum medical improvement.

Using the AMA *Guides,* Dr. Murati rated claimant as having a 7 percent left lower extremity impairment for the left ankle range of motion, a 5 percent left lower extremity impairment for the decreased sensation to the left distal saphenous distribution, and a 5 percent left lower extremity impairment for decreased sensation to the left medial plantar cutaneous distribution. This combined to a 16 percent lower extremity impairment. Dr. Murati assigned 50 percent of this impairment to the work disability, with the remaining attributable to claimant's subsequent nonwork related injury. However, given the scenario claimant testified to that he fell in May 2004 because his ankle was weak, Dr. Murati stated, assuming that fact, he would attribute claimant's impairment from that injury back to his September 2003 injury. However, on cross-examination, Dr. Murati also testified that claimant's stroke and subsequent medication in April 2004 was probably a factor in his May 2004 fall.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

When asked whether claimant suffered a sprain or strain of his ankle versus a fracture, Dr. Murati testified that there was a micro fracture in the neck of the talus which would produce significant complaints. Dr. Murati testified that the injury will cause pain the rest of claimant's life, the ankle will swell and claimant will have difficulty walking. Dr. Murati testified that claimant will need anti-inflammatory medication and possibly a low dose narcotic medication on bad days.

Dr. Chris Fevurly is board certified in internal medicine and preventive medicine. He saw claimant at the request of respondent's attorney on May 20, 2005. In his examination of claimant, Dr. Fevurly noted claimant had tenderness around the left lateral ankle but had no swelling. Dr. Fevurly found no instability, excessive creptitation, grinding or atrophy. Dr. Fevurly testified that it was rare for someone to be off work for 18 months because of a microtrabecular fracture of the talus. Dr. Fevurly stated that the normal healing time for such an injury would be 4 to 8 weeks, with symptoms for up to 12 weeks.

Dr. Fevurly testified that he thought claimant's injury to the talus had healed and resolved. Dr. Fevurly used the AMA *Guides* and opined that claimant had no permanent impairment as a result of his ankle injury. He further stated that he believed claimant should be able to do his regular activity based on the healed micro fracture.

Dr. Fevurly did not agree with Dr. Fanning in restricting claimant from working. Dr. Fevurly testified that he believed people recover better and have a better outcome if they remain in the workplace. He agreed with Dr. Fanning's finding that claimant was at maximum medical improvement on or about January 17, 2004. Dr. Fevurly stated that claimant had other medical issues which were important in understanding why he did not return to work. It was Dr. Fevurly's opinion that the treatment given claimant by Dr. Fanning was the result of his injury at respondent. Noting the period of September 17, 2003 to January 19, 2004, Dr. Fevurly stated he believes claimant could have worked with restrictions during that span of time and disagreed with Dr. Fanning that claimant was temporarily totally disabled.

Respondent disputes that claimant made timely written claim.[7] It is undisputed that claimant gave timely notice of his September 17, 2003, slip and fall accident to his supervisor, Barry Allen, that same day. Mr. Allen recorded the accident on claimant's attendance sheet. In addition, that same day the accident was reported to and a written record made by the respondent's medical clinic personnel.[8] K.S.A. 44-557(a) mandates that an employer file with the Division of Workers Compensation a report of any accident

[7] *See* K.S.A. 44-520a(a).

[8] Allen Depo., Ex. 1; Nelson Depo., Ex. 1.

"if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained." Claimant missed several months of work as a direct and natural consequence of his injury. Respondent failed to make a report of the accident and, therefore, claimant's time for making written claim was extended to one year.[9] Claimant served written claim upon the respondent within one year of his accident. Therefore, his written claim was timely made.

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[10] Breaks benefit both the employer and employee.[11] And in circumstances such as in this case where the employee is taking a break in an area designated by the employer for such purposes and on the employer's premises, there is a degree of control sufficient to find the accident compensable.[12] Furthermore, the evidence does not indicate that claimant's injury occurred as a result of any personal condition or risk, as in *Boeckman*[13] or *Martin*[14].

The Board finds claimant suffered personal injury to his ankle from an accident at work on September 17, 2003, when he was walking, struck a table and fell while on break on respondent's premises. The Board further finds that claimant's accident arose out of and in the course of his employment, and as a direct result thereof, he now has a 13 percent permanent partial impairment of function based upon the testimony of Dr. Fanning, the treating orthopedic physician.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 12, 2005, is reversed and benefits are awarded as follows:

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[9] *See* K.S.A. 44-557(c); *Childress v. Childress Painting Co.*, 226 Kan. 251, 254, 597 P.2d 637 (1979).

[10] *See* Larson's Workers Compensation Law § 13.05(4) (2003).

[11] *Id.; Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998) and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[12] *See* Larson's Workers Compensation Law § 21.02 (2000); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[14] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

The claimant is entitled to 24.7 weeks of permanent partial disability compensation, at the rate of $440.00 per week, in the amount of $10,868.00 for a 13 percent loss of use of the left lower leg, making a total award of $10,868.00, which is ordered paid in one lump sum less amount previously paid.

All authorized medical expenses and all reasonable medical treatment expenses are ordered paid subject to the Kansas Workers Compensation Schedule of Medical Fees. Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation. The claimant is entitled to unauthorized medical expenses up to the statutory maximum upon presentation of such bills to respondent.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Reporters' fees and costs are assessed to respondent as itemized in the ALJ's Award.

IT IS SO ORDERED.

Dated this _____ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary A. Winfrey, Attorney for Claimant
Vincent A. Burnett, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director